U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 July 2004

CASE NO: 2004-CAA-00005

In the Matter of:

SEBEDEO V. LOPEZ,
Complainant

v.

SERBACO, INC.,
Respondent

RECOMMENDED DECISION AND ORDER

Background

This proceeding arises under Section 322 of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. 7622, and the implementing regulations found at 29 C.F.R. § 24.1 *et seq*.. This Federal employee protection provision was the result of congressional concern for the protection of "whistle blower" employees from discriminatory actions by their employers. *Pulliam v. Worthington Service Corporation*, 81-WPC-1 (ALJ May 15, 1981).

On November 20, 2003, Complainant, Sebedeo Lopez, filed a complaint with the U.S. Department of Labor alleging retaliatory termination by his employer, Serbaco, Inc. Complainant was terminated by Respondent on October 24, 2003, and contends the termination resulted from earlier complaints to Respondent regarding the company's practice of allegedly operating a transfer pump that emitted pollutants into the atmosphere in violation of health and safety standards. Complainant also filed discrimination claims against Serbaco with the Equal Employment Opportunity Commission alleging unequal terms and conditions of employment based on his Hispanic national origin. Complainant's Exhibit ("CX") 1. This decision will address only the whistle blower complaint regarding termination of employment.

On December 15, 2003, an Occupational Safety and Health Administration ("OSHA") investigation dismissed the complaint for lack of merit. CX 2. OSHA determined that there was a legitimate business reason for Complainant's termination and that there was insufficient evidence to prove any protected activity or retaliatory motive for the termination.

On December 26, 2003, Complainant faxed his Request for Hearing. CX 3. The matter was docketed in the Office of Administrative Law Judges and assigned to the undersigned on January 13, 2004.

By Notice dated January 21, 2004, a hearing was scheduled for March 30, 2004 in Colorado Springs, Colorado. No formal or written appearance has been made herein by counsel for either Complainant or Respondent. Both Complainant and Respondent were advised by the undersigned of the right to the assistance of counsel prior to the commencement of the hearing. Complainant and Respondent knowingly and voluntarily elected to proceed with the hearing in the absence of counsel. Respondent appeared through its president, John Duby, and operations manager, Carol Duby. Complainant presented his own testimony and Carol Duby and John Duby testified on behalf of the Respondent. ALJ Exhibits ("AX") 1 through 3, as well as Complainant's Exhibits ("CX") 1 through 6, and Respondent's Exhibits ("RX") 1 through 18 were received into evidence. Upon the close of the evidence, and at Complainant's request, the parties were given until June 4, 2004, within which to submit written closing statements. Respondent filed a Summary Brief on May 17, 2004. Complainant did not file any post-hearing brief.

Issues

1. Whether the Complainant engaged in activity which is protected within the meaning of the Act, and

2. Whether any adverse action taken against Complainant was due to his engaging in protected activity.

Statement of the Case

Complainant was hired by Respondent in July, 2003 as a technician at the Rocky Mountain Steel Mills ("RMSM") in Pueblo, Colorado. RMSM has two steel furnaces at its Pueblo facility, each of which is ventilated by a fabric filter system, commonly called a "bag house." Transcript ("Tr."), p. 100. RMSM operates this mill under a compliance order from the U.S. Environmental Protection Agency and the Colorado State Department of Health, which requires, in part, that a contractor be on site to monitor air emissions (primarily steel dust) at the facility. Tr., pp. 101-102. The two "bag houses" collect the steel dust produced by the two furnaces from which the dust is vacuumed into silos for storage and then loaded onto railcars for disposal. Respondent had a long term contract with RMSM to keep the two "bag houses" in operation and to perform preventive maintenance and lubrication. Tr., p. 102. Complainant was trained for several weeks and then was assigned to the night shift where he was normally the sole Serbaco technician responsible for monitoring the air pollution equipment at the RMSM facility. Tr., pp. 37-39.

Complainant alleges that during the month of October, 2003, the receiver filters (also referred to as "bags") in one of the silos at the RMSM facility was leaking and that as a result, the transfer pump could not be turned on without pollutants being released into the atmosphere in violation of Clean Air regulations. Complainant testified that he had been told several times to

turn on the transfer pump at night so that its emissions due to the leak would not be easily visible. Tr., pp. 71-72. On the evening of October 23, 2003, while the receiver filters in the silo continued to leak, Complainant testified that he questioned his supervisor, Mr. Kim Jaynes, as to whether he should turn on the transfer pump as the day shift had told him to do. Complainant stated that when he inquired of Mr. Jaynes as to what he should say if he were questioned by OSHA or state agency officials about the release of pollutants into the atmosphere, Mr. Jaynes "got a little attitude" and then personally turned on the transfer pump thereby causing the release of pollutants into the atmosphere.Tr., pp. 44-49. Mr. Jaynes normally worked only during the day, but had been called out to the facility at approximately 9:15 PM that evening to check on a problem with the gauges. Tr., pp. 41-43. This incident occurred at approximately 11:00 PM on October 23, 2004, following which Mr. Jaynes left for his home. Tr., pp. 46-47.

Complainant alleges that he was fired several hours later, at about 3:30 AM on October 24, 2003, for allegedly sleeping on the job during his shift at the RMSM facility. Statements of Mr. Jaynes and of the RMSM supervisor, Sean Ortiz and another RMSM worker, Tim Cordova, state that Complainant failed to answer radio calls from Mr. Cordova as to his whereabouts. After Mr. Cordova unsuccessfully searched for Complainant, both Mr. Ortiz and Mr. Cordova conducted a second search of the facility during which they found Complainant sleeping. This discovery prompted Mr. Ortiz to call Mr. Jaynes at his home and request that Jaynes return to the RMSM facility to deal with his employee, the Complainant. According to these statements, Jaynes drove over to the RMSM facility where he, Ortiz and Cordova then approached Complainant who was sleeping in a chair with his feet propped up on a second chair. RX 11, 12 and 13. Complainant does not deny that he was sitting on a chair with his feet propped up upon a second chair, but does deny that he was asleep and further denies that any radio calls were made to him prior to the incident. Tr., pp. 50-54. Mr. Jaynes immediately terminated Complainant's employment for violation of written company policy against sleeping on the job. Tr., p. 55; RX 3, p. 18. Complainant alleges that he "was set up" and that his termination was in retaliation for his questioning the use of the transfer pump and the resultant pollution of the atmosphere. Tr., pp. 61-62.

Applicable Law

The CAA at 42 U.S.C. §§ 7622 states:

(a) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of an employee)—

(1) commenced or caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of the Act.

The Secretary of Labor has repeatedly articulated the legal framework under which parties litigate in retaliation cases. Under the burdens of persuasion and production in environmental "whistleblower" proceedings, the complainant must first present a *prima facie* case of retaliation by showing:

1) that the respondent is governed by the CAA;

2) that the complainant engaged in protected activity as defined by the CAA;

3) that the respondent had actual or constructive knowledge of the protected activity and took some adverse action against the complainant; and

4) that an inference is raised that the protected activity of the complainant was the likely reason for the adverse action.

See *Hoffman v. Bossert*, Case No. 94-CAA-4 at p. 3-4 (Sec'y Sept. 19, 1995); *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995); *Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 480-81 (3d Cir. 1993); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995).

Protected Activity

Whistleblower provisions are intended to promote a working environment in which employees are free from threats of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Air Act. *Passaic Valley*, 992 F.2d at 478. Such provisions are intended to encourage employees to aid in the enforcement of such statutes through protected procedural channels. *Id.* With this purpose in mind, "protected activity" has been broadly defined as a report or internal complaint of an act which the complainant reasonably believes is a violation of an environmental act. The complainant need not prove that an actual violation occurred. Rather, he must prove only that his complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Ilgenfritz v. United States Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

Internal complaints are specifically recognized as protected activity because the employee is encouraged to first take environmental concerns to the employer to allow the perceived violation to be corrected without governmental intervention. *Poulos v. Ambassador Fuel Oil Co., Inc*., 86-CAA-1 (Sec'y Apr. 27, 1987)(Order of Remand). Such complaints also afford the employer an opportunity to justify or clarify its policies where the perceived violations are a matter of employee misunderstanding. *Ilgenfritz*, 1999-WPC-3, at p. 479.

Although broadly defined, protected activity has been limited to the assertion of violations that involve a safety issue or an issue which impacts the environment. In *Odom v.*

Anchor Lithkemko/International Paper, for example, the Administrative Review Board held that it is "well established that the whistleblower provisions forbid an employer from retaliating against an employee because he complained about reasonably perceived violations of the Acts' requirements related to environmental safety." 96-WPC-1 (ARB Oct. 10, 1997). The provisions do not apply to [a claimant's] occupational, racial, and other nonenvironmental concerns." *Id.* at p. 5. *See also Mackowiak v. University Nuclear Systems, Inc.,* 735 F.2d 1159 (9th Cir. 1984) (Energy and Reorganization Act protects employees from retaliation based on internal safety and quality control complaints); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB April 8, 1997) (whistleblower provisions protect employees for making safety and health complaints); *Deveraux v. Wyoming Assoc. of Rural Water*, 93-ERA-18 (Sec'y Oct. 1, 1993) (complaints to management about inaccurate records, mismanagement and waste are not related to environment or safety); and *Basset v. Niagara Mohawk Power Co.,* 85-ERA-34 (Sec'y Sept. 28, 1993) (protected conduct includes filing internal quality control reports and making internal complaints regarding safety or quality problems).

Inference That Protected Activity Was Reason for Adverse Action

To prevail on the fourth element of the *prima facie* case, a complainant needs only to establish a reasonable inference that his or her protected activity lead to, or caused, the respondent's adverse action. This burden to show an inference of unlawful discrimination is not onerous. *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993). One factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Close temporal proximity may be legally sufficient to establish the causation element of the *prima facie* case. *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993). On the other hand, if a significant period of time lapses between the time the respondent is aware of the protected activity and the adverse action, the absence of a causal connection between the protected activity and the adverse action may be sufficiently established. *Shusterman v. Ebasco Serv., Inc.* 87-ERA-27 (Sec'y Jan. 6, 1992).

Burden of Producing Evidence Shifts upon Prima Facie Showing by Complainant

If the complainant presents a prima facie case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. In other words, the respondent must show it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989).

If the case proceeds to a hearing before the Secretary, the complainant must prove the same elements as in the prima facie case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. *Trimmer v. U.S. Dept. of Labor,* 174 F.3d 1098 (10th Cir. 1999) (case below 93-CAA-9 and 93-ERA-5); *See also Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997) (holding that Secretary's construction of §§ 5851(b)(3)(C), making complainant's burden a preponderance of evidence, was reasonable). The complainant may meet this burden by

showing that the unlawful reason more likely motivated the respondent to take the adverse action. Or, the complainant may show the respondent's proffered explanation is not credible. See *Zinn v. University of Missour*i, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.,* 86-ERA-32 (Sec'y Jun. 28, 1991); *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983). Only if the complainant meets his burden does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Darty v. Zack Co.,* 80-ERA-2 (Sec'y Apr. 25, 1983) at p. 5-9, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

Findings of Fact & Conclusions of Law

Prima Facie Case

The Respondent is governed by the CAA as the issues claimed by the Complainant involve efforts to comply or obtain a waiver with respect to the air pollution prevention aspects of the Act. Complainant claims that he engaged in protected activity by voicing internal complaints to his supervisor, Mr. Jaynes, with regard to the potential pollution from use of the transfer pump while the silo had a problem with leaking bags. These internal complaints to Mr. Jaynes relate to issues impacting the environment and thus constitute protected activity for purposes of the Act. See *Poulos v. Ambassador Fuel Oil Co., Inc*., 86-CAA-1 (Sec'y Apr. 27, 1987) (Order of Remand); *Odom v. Anchor Lithkemko/International Paper,* 96-WPC-1 (ARB Oct. 10, 1997). Mr. Duby testified that any issue regarding leaking bags would not be a high priority given the overall storage capacity at the facility which should allow ample time to fix any leaks. Tr., pp. 129-132. However, the statements of Jason Lee Quick, Joe Lopez, and to some extent, even Mr. Jaynes, do indicate some concern about torn bags and the possibility of pollutants being emitted should the transfer pumps be operated without the leaking bags being fixed. CX 5 and 6; RX 3, pp. 12-13. Accordingly, the internal complaints voiced by Complainant herein were "reasonably perceived violations of the environmental acts." *Ilgenfritz v. United States Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

There seems to be no real dispute that Complainant was terminated by Respondent (an adverse employment action). Complainant testified that he was terminated within hours of his complaint to Respondent about potential air pollution from operating the transfer pump. Given that the burden to show an inference of unlawful discrimination is not onerous and the obvious temporal proximity of the termination herein, I find the evidence sufficient to establish the causation element of the *prima facie* case. See *McMahan v. California Water Quality Control Board, San Diego Region*, 90-WPC-1 (Sec'y Jul. 16, 1993); *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993).

Thus, Complainant has shown that he was engaged in a protected activity; that he was the subject of an adverse employment action; and that there was a reasonable inference of a causal link between his protected activity and the adverse action since the termination followed within hours of his communication to the Respondent his complaint regarding adherence to environmental regulations.

Nondiscriminatory Justification by the Respondent for Termination

Respondent contends that Complainant was terminated because he was found sleeping on the job while Complainant denies that he was sleeping, but rather claims that he was "set up" due to his internal environmental complaints. While Complainant denies that he was found sleeping on the job, he does not deny that he was sitting down with his feet propped up on a second chair when he was found. The undersigned finds it difficult to believe that Mr. Jaynes would have set up this ruse of firing Complainant within only a few hours of the comments made by Complainant. Mr. Jaynes had already worked all of the preceding day and had been called back out to the facility from about 9 PM to 11 PM that evening. Tr., p. 51. Had Mr. Jaynes desired to fire Complainant, why would he go to his home for only two to three hours of sleep before returning to the facility to carry out his alleged plan to fire Complainant on a pretext? Further, why would Messrs. Ortiz and Cordova be so inclined as to help Mr. Jaynes carry out this revenge termination of Complainant? Complainant's admitted resting upon two chairs is just too coincidental to base a finding that all three of these gentlemen collaborated to effect this termination scheme against Complainant based on his rather innocuous comment to Mr. Jaynes about a problem described by the Respondent's president as not being a very high priority. Thus, I find that the evidence in this case supports a finding that Complainant was terminated for violation of the company policy against sleeping while on duty.

Accordingly, I find that Complainant has not met his burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Darty v. Zack Co.,* 80-ERA-2 (Sec'y Apr. 25, 1983) at p. 5-9, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Complainant has not proven retaliation by Respondent and his complaint is hereby **DISMISSED**.

SO ORDERED.

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Russell D. Pulver
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

Russell D. Pulver
Administrative Law Judge